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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-210

LAURENCE H. FROMMHAGEN, Petitioner,

vs.

BYRON N. SCOTT, Respondent.

PETITIONER'S REPLY BRIEF

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LAURENCE H. FROMMHAGEN, Petitioner,

vs.

BYRON N. SCOTT, Respondent.

On Petition for a Writ of Certiorari
to the District of Columbia Court of Appeals

PETITIONER'S REPLY BRIEF

I. RESPONDENT IN HIS OPPOSITION BRIEF DISTORTED AND MISREPRESENTED SEVERAL FACTUAL SITUATIONS.

In the Respondent's Opposition Brief, Scott represents that Frommhagen stipulated in the pre-trial proceeding that he (Frommhagen) had insisted that the petition be printed in San Francisco and had refused to pay printing costs and the filing fee. The Record from the Superior Court demonstrates that petitioner never made such stipulations at any time in the proceedings below. Indeed Frommhagen objected vigorously at the pre-trial proceeding to Scott's representations that Frommhagen had insisted upon a printing of the petition in California and that Scott had objected to that procedure during the telephone conversations. It is apparent from the Respondent's Opposition Brief that Scott therein distorted and transformed Frommhagen's stipulation that he had agreed to pay all court costs into a

stipulation that he refused to pay the costs of printing and filing fee. Petitioner never made the latter stipulation.

The tape recordings of the telephone conversations, so greatly feared by Scott, would have proven that there were no disputes regarding the prepayment of costs. During the telephone conversations in August and September of 1971, Scott, with no objection, agreed that the petition be printed in San Francisco (where Frommhagen would pay the printer) and that Frommhagen, when he came to Washington, D.C. before the due date, as calculated by Scott, of September 13, could pay the filing fee directly to the Clerk of this Court. Furthermore, Scott agreed during those conversations that, under such circumstances, the need for prepayment of costs did not exist. In fact, Frommhagen did come to the District of Columbia in October of 1971 when he paid the filing fee in the office of the Clerk and filed the out-of-time petition prepared by his San Francisco attorney.

In his Opposition Brief, on page 1, Scott asserts that breach of contract was the controlling issue. However, it is apparent from the Record and from the Opinion of the Trial Judge that Frommhagen's allegation of negligence was a separate and equal issue in the Courts below.

Scott represents on page 6 of his Opposition Brief that he told petitioner's San Francisco attorney that if the petition was to be printed in California "it would be up to Frommhagen" (whatever that means). However, the San Francisco attorney, Herbert W. Yanowitz, in a deposition dated March 15, 1972 and filed in the Superior Court prior to the trial, stated that all he had been told by Scott during that particular telephone conversation was that he (Scott) was representing Frommhagen and that the draft of the petition for writ of certiorari would be sent within a few days to the petitioner. Mr. Yanowitz had called only for the purpose of determining whether he should be substituted as Frommhagen's attorney.

In an array of statements on page 6 of the

Opposition Brief, the respondent seeks to convey the impression that he had always been aware of the correct due date for filing of the petition. However, in the draft of the petition, authored by Scott, included in the Record before the Court, there appears the following statement on the second page under Jurisdiction: "The judgment of the Court of Appeals for the Ninth Circuit was entered on April 27, 1971 to become effective June 15, 1971. This Petition was filed within 90 days of that effective date" (Emphasis supplied). Ninety days from June 15 was September 13. It is apparent that Scott believed, when he wrote that draft in late August, that the ninety day period tolled from the date of the issuance of the mandate. Furthermore the representations made by Scott on page 6 of the Opposition Brief are contradicted by his own testimony appearing on page 10 and 11 of the Reporter's Transcript covering a portion of the trial.

On Page 8 of the Respondent's Opposition Brief, under Reason No. 4, Scott alludes to a "fact" to which, he states, petitioner had agreed at pre-trial. But Scott does not state at any point in his brief the nature of that "fact." The Record shows that Frommhagen stipulated only that Scott told him during a telephone conversation on June 18, 1971, that the due date was ninety days from the issuance of the mandate. The tape recording of that conversation would have proven petitioner's position on that matter, as would have Scott's sworn Answer to the Grievance Committee. However, the Court was not going to brook any disruption of Scott's testimony, whether by the tape recordings of the telephone conversation, Scott's sworn, prior inconsistent statement, or the testimony of the petitioner. Unfortunately Scott's Answer to the Grievance Committee is not in the Record.

II. THE COURT NOTED THE TESTIMONY DURING THE TRIAL, NOT THE PRE-TRIAL STIPULATIONS.

In his ruling on the admissibility of the tape recordings (on page 22 of the Reporter's Transcript), the Trial Judge stated: "First of all, in the exercise of my discretion I feel that I have heard ample

evidence from the testimony here.." (Emphasis added). Neither at that time or at any other point in the proceeding did the Court refer to any pre-trial stipulations. The Court relied only upon the self-serving uncorroborated testimony by Scott during the trial in regard to the precise content of the telephone conversations, agreements as to costs, printing of the petition, etc.

III. RESPONDENT SEEKS, THROUGH DISTORTION, TO EVADE THE REAL ISSUES.

By blending distortions of the petitioner's pre-trial stipulations with excerpts of his own testimony, the respondent hopes to persuade this Court that the petitioner had agreed to certain "facts" at the pre-trial proceeding which permitted the Trial Court to disallow Frommhagen's attempts to impeach Scott's testimony. Petitioner never made such stipulations and the Trial Judge did not base his decisions on those or any other stipulations.

The central issue in this appeal remains the refusal of the Court's below to permit Frommhagen's attempts to impeach Scott's testimony with prior inconsistent statements contained in the tape recordings of the telephone conversations and in Scott's Answer to the Grievance Committee. It did not lie within the Court's discretion to exclude those attempts at impeachment and to accept only Scott's version of the events.

Petitioner respectfully requests the Court to compare Scott's representations in the Opposition Brief to the Record. It was with the expectation that Scott would attempt such distortions, as is his modus operandi, that petitioner insisted that the Record be transmitted to this Court. In addition, petitioner has requested the Court of Appeals today to transmit the depositions of Herbert W. Yanowitz.

Respectfully submitted:

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Pro Se

November 19, 1973.